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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE PATERNITY OF K.J.A.,	)	
K.J.A., A minor, by her next friend, AMANDA D. TOLLIVER,	)	
Appellee-Petitioner,	)	No. 83A04-0609-JV-483
vs.	)	
ERIC ATTEBERRY,	)	
Appellant-Respondent.	)	

APPEAL FROM THE VERMILLION CIRCUIT COURT
The Honorable Bruce V. Stengel, Judge
Cause No. 83C01-0306-JP-15

April 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent Eric Atteberry, (Atteberry), appeals the trial court's denial of his motion to modify the custody of his five-year-old daughter, K.A. (K.A.).

We affirm.

ISSUE

The sole issue for our review is whether the trial court erred in denying Atteberry's motion to modify custody.

FACTS AND PROCEDURAL HISTORY

In September 2003, the trial court entered an agreed order establishing that Atteberry is K.A.'s father. Amanda Tolliver, (Tolliver), K.A.'s mother, and Atteberry agreed that they would share joint legal custody of K.A. and that Tolliver would have primary physical custody of the child. Atteberry was awarded visitation pursuant to the Indiana Parenting Time Guidelines.

Three years later, in May 2006, Atteberry filed a petition to modify custody. Testimony at the hearing on Atteberry's modification petition revealed that Atteberry married Amy Atteberry two months before the hearing, and that they have a sixteen-month-old child. Attebury and his wife both live and work in Paris, Illinois.

At the time of the hearing, Tolliver also lived and worked in Paris, which is where K.A. attended daycare. Tolliver, however, planned to register the child for elementary school and after-school daycare twenty-five miles away in Clinton, Indiana. Atteberry complained at the hearing that he would not be able to drive K.A. to school everyday as he had planned or have overnight visits with her during the week.

Atteberry also shared his concern about the late hours that Tolliver works as well as the fact that her gas was turned off for two or three months and she was recently evicted from an apartment. He admitted, however, that K.A. has an affectionate relationship with her mother. Atteberry's wife shared her concern that Tolliver let K.A. ride in her car without a car seat.

Tolliver testified that although she currently lives in Paris with her sister, she has saved enough money to move to Clinton to be near her son, who spends alternate weeks with her. After the move, Tolliver planned to register K.A. in Clinton schools. When school started, she planned to drive K.A. to school every day on her way to work in Paris. Tolliver denied that her gas had ever been turned off or that she had been evicted from an apartment. She explained that she had briefly driven without a car seat when she purchased a new car, and that she would be working fewer hours in the future because her employer of four years had cut back on overtime hours.

K.A.'s current daycare provider, Amy Waltz, testified that Tolliver is a good parent and that K.A. is a normal kid who loves everybody. According to Waltz, K.A. has never said that she did not want to be with her mother. Waltz also testified that K.A. would do well at another daycare.

Following the hearing, the trial court issued an order denying Atteberry's petition. The order stated that the court found no substantial change in circumstances and that it was not in K.A.'s best interest to modify custody. The trial court did not issue findings of fact or conclusions of law.

Atteberry now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Initially, we note that Tolliver has failed to file an appellate brief. When an appellee fails to file a brief, we may apply a less stringent standard of review and reverse the trial court's judgment if the appellant demonstrates prima facie error. Rendon v. Rendon, 692 N.E.2d 889, 893 (Ind. Ct. App. 1998). However, we may also, in our discretion, decide the case on the merits. Id. Due to the nature of the issues involved in this appeal, we exercise such discretion here. See id.

I. *Standard of Review*

The modification of a custody order lies within the sound discretion of the trial court. Haley v. Haley, 771 N.E. 2d 743, 747 (Ind. Ct. App. 2002). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id. We neither judge witness credibility nor reweigh the evidence. Id. Further, we consider only the evidence that supports the trial court's decision. Id.

The Indiana Supreme Court explained the reason for this deference in Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002):

> While we are not able to say the trial court judge could not have found otherwise than he did upon the evidence introduced below, this Court as a court of review has heretofore held by a long line of decisions that we are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence, or that he should have found its preponderance or the inferences therefrom to be different from what he did.

II. *Analysis*

To prevail on his petition to modify custody, Atteberry was required to show that modification was in K.A.'s best interests and that there was a substantial change in one or more of the factors identified in Indiana Code Section 31-17-2-8. See Ind. Code § 31-17-2-21. Such factors include the age of the child; the interaction and interrelationship of the child with her parents, siblings, or any other person who may significantly affect the child's best interests; the child's adjustment to home, school, and community; and the mental and physical health of all individuals involved. I.C. § 31-17-2-8. A change in conditions must be judged in the context of the whole environment, and the effect on the child is what renders a change substantial or inconsequential. In re Paternity of B.D.D., 779 N.E.2d 9, 14 (Ind. Ct. App. 2002).

Here, Atteberry argues that the trial court erred in denying his petition to modify custody because the modification is in K.A.'s best interests and the following substantial changes in circumstances justify it: 1) K.A. is now five years old; 2) enrolling K.A. in daycare and school in Clinton would require her to leave her familiar daycare and community; and 3) Atteberry's household is more stable than Tolliver's and K.A. has an affectionate relationship with him, his wife, and his son.

However, Atteberry has failed to allege or prove that enrolling K.A. in daycare and school in Clinton and leaving her in Tolliver's custody are in any way detrimental to K.A.'s best interests. On the contrary, the evidence reveals that K.A. is a happy child who loves everyone, and that she would adjust well at a new daycare. The evidence further reveals that Tolliver is a good parent who has an affectionate relationship with her daughter. The evidence (or lack thereof) clearly supports the trial court's conclusion that

Atteberry failed to establish that a modification of custody would be in K.A.'s best interests or that there was a substantial change in any of the factors set forth in Indiana Code Section 31-17-2-8. See Fridley v. Fridley, 748 N.E.2d 939 (Ind. Ct. App. 2001) (affirming the trial court' denial of a custody modification petition where the evidence established children's move to Arizona was not detrimental to their best interests).

CONCLUSION

Based upon the foregoing, we find that the trial court did not err in denying Atteberry's petition.

Affirmed.

KIRSCH, J., and FRIEDLANDER, J., concur.